

EXHIBIT 23

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

ULTIMA SERVICES CORPORATION

v.

U.S. DEPARTMENT OF
AGRICULTURE, et al.,

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Case No.
2:2020cv00041

Monday, April 25, 2022

30(b)(6) Zoom Videoconference
deposition of JOHN KLEIN, taken with the witness
participating from his residence, beginning at
9:38 a.m., Eastern Standard Time, before Ryan K.
Black, a Registered Professional Reporter,
Certified Livenote Reporter and Notary Public.

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I N D E X

TESTIMONY OF: JOHN KLEIN	PAGE
By Mr. Rosman.....	6, 211
By Ms. Smith.....	206

E X H I B I T S

EXHIBIT	DESCRIPTION	PAGE
Klein 1	a document Bates Numbered US0050764 through US0050774.....	26
Klein 2	a document Bates Numbered US0071620 through US0071621.....	37
Klein 3	a document titled Federal Register, dated Thursday, October 12, 2002, Executive Order 13170 - Increasing Access and Opportunities for Disadvantaged Businesses.....	41
Klein 4	a document titled Form 1010, 8(a) Application.....	61
Klein 5	a document titled Form 1010-IND.....	61
Klein 6	a document Bates Numbered US0051094 through US0051215.....	122
Klein 7	a document Bates Numbered US0050780 through US0050923.....	122
Klein 8	a document Bates Numbered US0050948 through US0050970.....	122

I N D E X (Cont'd)

EXHIBIT	DESCRIPTION	PAGE
Klein 9	a document Bates Numbered US104099 through US104103.....	144
Klein 10	a document Bates Numbered US0104107 through US0104108.....	145
Klein 11	a document Bates Numbered US0063188 through US0063190.....	151
Klein 12	a document Bates Numbered US0063899 through US0063905.....	151
Klein 13	a document Bates Numbered US0062817 through US0062818.....	155
Klein 14	a document Bates Numbered US0052929 through US0052938.....	155
Klein 15	a document Bates Numbered US0054376 through US0054378.....	163
Klein 16	a document Bates Numbered US0054351 through US0054352.....	166
Klein 17	a document Bates Numbered US0063192 through US0063194.....	168
Klein 18	a document Bates Numbered US0114698 through US0114701.....	171
Klein 19	a document Bates Numbered US0063336 through US0063339.....	172

I N D E X (Cont'd)

EXHIBIT	DESCRIPTION	PAGE
Klein 20	Incorrectly marked.....	173
Klein 21	a document Bates Numbered US063333 through US063335.....	173
Klein 22	a document Bates Numbered US0052868 through US0052870.....	176
Klein 23	a document Bates Numbered US0063537 through US0063538.....	177
Klein 24	a document Bates Numbered US0052943 through US0052945.....	181
Klein 25	Incorrectly marked.....	181
Klein 26	a document Bates Numbered US0053299 through US0053300.....	181

1 things of that sort. They're also part of --
2 our headquarters in the Office of Business
3 Development has two field offices that deal with
4 8(a) eligibility cases, one in Philadelphia and
5 one from San Francisco. We also have several
6 disaster offices throughout the country, as well.

7 Q. Were you done with your answer?

8 A. Yeah.

9 Q. Okay. Are the offices in San Francisco
10 and Philadelphia also called central office duty
11 stations?

12 A. I think that's probably true, yes.

13 Q. So the General Contracting and Business
14 Development Office is a division of the Small
15 Business Administration, correct?

16 A. Yes.

17 Q. Okay. And give me a general description
18 of what it does.

19 A. Well, you know, SBA has three basic
20 functions: Credit, capital and contracts. So
21 there's different parts of those things. The
22 Office of Government Contracting and Business
23 Development has all the government contracting
24 programs, in addition to 8(a) Business
25 Development Program. It oversees the Small

1 Disadvantaged Business Programs, the Service
2 Disabled Vet Program, Women-Owned Small Business
3 Program, the Hub Zone Program, Small Business
4 Set-asides, Size Standards, 8(a) Business
5 Development, generally. That's what's within
6 that program area.

7 Q. Okay. Then let me just make sure I
8 understood your answer. Within their aegis is
9 size standards; is that right?

10 A. Yes.

11 Q. And it also supervises the 8(a) Business
12 Development Program; is that right?

13 A. Yes.

14 Q. Okay. Mr. Hidalgo, is he the associate
15 administrator for the Government Contracting and
16 Business Development Office?

17 A. Yes, she is. Bibi Hidalgo.

18 Q. Mm-hmm. And Bibi is B-i-b-i, correct?

19 A. Correct.

20 Q. All right. And other than supervising
21 the general duties of that office, does he have
22 any other duties?

23 MR. FISHMAN: It's a she. He's a
24 syndicated.

25 MR. ROSMAN: Oh, I apologize. My bad.

1 I didn't hear you.

2 BY MR. ROSMAN:

3 Q. So I'll repeat the question but use the
4 correct pronoun. Does she have any other office
5 -- sorry. Start again.

6 Does she have any other responsibilities
7 other than supervising that office?

8 A. I don't think so.

9 Q. Okay. Is the Office of Business
10 Development a separate office within the General
11 Contracting and Business Development Office?

12 A. It is a cell office. There are
13 several cell offices under BCBD, the Office of
14 Business Development, the Office of Government
15 Contracting, the Office of Hub Zones and the
16 Office of Procurement Policy and Liaison are all
17 underneath the government contracting and
18 business development big office.

19 Q. I don't think I heard the word that you
20 used at the beginning of your answer. What kind
21 of offices are considered?

22 A. I don't understand that question.
23 What kinds of offices are considered? That
24 doesn't make sense. What does that mean?

25 Q. No. No. You used a word at the

1 beginning of your response to my last question
2 and I didn't hear it. Was it a suboffice?

3 A. Maybe that's what I said, sure.

4 Q. Ms. Peebles is the administrator of the
5 Office of Business Development; is that right?

6 A. I'm sorry?

7 Q. Is Ms. Peebles --

8 A. Yes.

9 Q. -- the Administrator of the Office of
10 Business Development?

11 A. She's the associate administrator for
12 Business Development.

13 Q. And does she report to Ms. Hidalgo?

14 A. Yes.

15 Q. Okay. Generally, what are her duties?

16 A. She oversees the running of the Business
17 Development -- 8(a) Business Development Program,
18 all aspects of it, in terms of eligibility, in
19 terms of Business Development 7(j) assistance, in
20 terms of eligibility for contracting. All those
21 sorts of issues.

22 Q. Okay. In the Small Business
23 Act, there's a position called the Associate
24 Administrator for Minority Small Business and
25 Capital Ownership Development. Is that

1 a different position from the one that
2 Ms. Peebles has?

3 A. No. That is the exact position. They
4 just changed the name in practice.

5 Q. When was the name changed in practice?

6 A. Many years ago.

7 Q. Do you know why?

8 A. I do not know why. That's a political
9 issue.

10 Q. Okay. Oh, I should have asked this at
11 the outset: Are you a political appointee?

12 A. No.

13 Q. Are you in the senior executive service?

14 A. Yes.

15 Q. Is there something within the Office
16 of Business Development called the Office of
17 Certification and Eligibility?

18 A. Yes.

19 Q. And can you tell me what that is?

20 A. That is the office that processes all
21 8(a) applications to be admitted to the program.
22 It also oversees certain annual reviews to ensure
23 continued 8(a) eligibility, and it initiates
24 termination and suspension actions when
25 firms should no longer be in the program.

1 Q. There's something in the Small Business
2 Act called the Division of Program Certification
3 and Eligibility. Is that different from the
4 Office of Certification and Eligibility?

5 A. No.

6 Q. There was a name change at some point?

7 A. From time to time, depending upon -- you
8 know, sometimes different administrations called
9 it an office, sometimes they called it a
10 division, but it is the same office.

11 Q. Who's the current director of that
12 office?

13 A. Sandra Barrett.

14 Q. I referred earlier to the central office
15 duty stations. Are they a part of the Office of
16 Certification and Eligibility?

17 A. Yes. Those two are.

18 Q. I'm sorry. Those two ... I didn't hear
19 the last word.

20 A. Yes. They are part of that office, yes.

21 Q. Okay. Is there something within the
22 Office of Business Development called the Office
23 of Management and Technical Assistance?

24 A. That is a suboffice underneath the
25 Office of Business Development, correct.

1 A. I don't know the answer to that. I
2 don't think we've done a whole new version in the
3 last few years. We've changed a few sections
4 here and there. So maybe you need to look at
5 that particular page where the change is and see
6 whether or not that was changed or not. But we
7 have not put out a whole new SOP in the last few
8 years.

9 Q. Okay. Are you familiar with 408
10 reports?

11 A. Yes.

12 Q. Could you just identify what a 408
13 report is?

14 A. Well, it was a authorized by Section 408
15 of this law way back when. And it authorizes
16 -- I mean it requires SBA to report to Congress
17 certain types of data regarding of participants
18 in a program, dollars, things of that sort.

19 Q. Does the SBA still produce 408 reports?

20 A. It does do it. Unfortunately, it is not
21 up to date in doing them, but it does do them,
22 yes.

23 Q. The last one that was produced to us was
24 for fiscal year 2017. Has one been done since
25 then?

1 A. I think it has not been done since then,
2 because several years were produced, but then
3 they had to get 508 compliant. And that stopped
4 the process, unfortunately, and we have a
5 contractor working on that as we speak.

6 Q. And so what kind of compliance did it
7 need to get? Say it again, please.

8 A. 508 compliant for the blind and
9 handicapped.

10 Q. And so have drafts of subsequent years'
11 reports been made?

12 A. I believe that's true, yes.

13 Q. Do you know for what years?

14 A. At least two more years.

15 Q. So that would be fiscal year 2018 and
16 fiscal year 2019; --

17 A. I think that's correct.

18 Q. -- is that right?

19 A. I think that's correct. I'm not
20 positive, but I think that's correct.

21 Q. Describe for me in general terms what
22 the respective roles of the SBA and other federal
23 agencies are in the program of the 8(a) Business
24 Development Program.

25 A. So SBA is involved in all aspects of the

1 program, obviously. And from certifying firms up
2 front, again, to determining eligibility every
3 year, to terminating firms from the program when
4 they're no longer eligible. We're also involved
5 in setting policies and guidance regarding
6 contracting through the 8(a) Program. And we are
7 involved in accepting offerings into the 8(a)
8 Program when the procuring agency decides to
9 procure through the 8(a) Program.

10 The 8(a) Program is a discretionary
11 program. The procuring agency has the discretion
12 to use it or not use it depending upon what meets
13 their best needs.

14 Q. Okay. Does the SBA generally have
15 partnership agreements with other federal
16 agencies to implement the 8(a) Business
17 Development Program?

18 A. Yes. And the partnership agreement,
19 basically -- I mean, well, let me start again.

20 By statute SBA is the prime
21 contractor with the procuring agency, and then
22 SBA subcontracts the performance of the contract
23 to 8(a)-certified firms. Through the partnership
24 agreement, we've eliminated that process. The
25 SBA has delegated its contract execution

1 functions to procuring agencies so they can
2 contract directly with the 8(a) participant.

3 Q. As I understand it, though, the
4 contracts still have to identify the SBA as
5 the prime contractor; is that right?

6 A. I think that they do through the
7 partnership agreement, but I think the contract
8 itself does not necessarily have to do that any
9 longer.

10 Q. So the contract cannot refer to the SBA;
11 is that right?

12 A. I think it's depending upon the agency.
13 Some do and some don't. I don't want to say what
14 they do across the board because I don't think
15 it's consistent.

16 MR. ROSMAN: Michelle, would you
17 introduce the partnership agreement as an
18 exhibit.

19 MS. SCOTT: Yeah. Hold on one second.
20 The partnership agreement?

21 MR. ROSMAN: Yeah. Partnership AG, I
22 think, is how it's labeled.

23 BY MR. ROSMAN:

24 Q. So I looked at a number of partnership
25 agreements that you have on the web. Is there a

1 it. It could be that or it could be, "do you
2 have any." "I have firms that can do X, Y and Z.
3 Do you have any firms that can do that kind of
4 -- any opportunities coming up in that area."
5 So it could be one way or the other. It could
6 be, "do you have anything," or, you know, more of
7 what you said before.

8 Q. Okay. All right.

9 And would you say that the majority of
10 contracts that are accepted into the 8(a) Program
11 at this point are accepted through the offering
12 letter process?

13 A. Yes.

14 Q. And that there's few of them that are
15 instigated through the requirement letter?

16 A. Well, the -- nothing's -- even if
17 there's a requirements letter that goes out,
18 the only way it comes into the program is through
19 the offering letter. So there's still an
20 offering letter in response to that requirements
21 letter, so there's still an offering letter.

22 Q. Let me rephrase the question.

23 The majority of contracts that are
24 accepted into the 8(a) Program come in without
25 there having been a requirement letter at the

1 outset of the process.

2 A. I think that's true, yes.

3 Q. All right.

4 What is the goal for small businesses
5 that the SBA wants agencies to meet?

6 A. There's a statutory goal of at least 23
7 percent for small businesses.

8 Q. And that's set by Congress?

9 A. Yes.

10 Q. Is that goal different from -- let me
11 start over.

12 Does each agency have a separate goal
13 for small businesses?

14 A. SBA negotiates goals with every agency.

15 Q. And so it's not necessarily 23 percent
16 for each agency; is that right?

17 A. No. That's correct.

18 Q. Okay. No, it's not 23 percent; yes,
19 what I said was correct, correct?

20 A. Some agencies are above 23 percent, some
21 agencies are below. We have to set goals to
22 ensure that at least 23 percent is
23 government-wide.

24 Q. Okay. So the denominator of that
25 percentage calculation is something called Total

1 it's not very long -- but I'm going to ask you to
2 read a particular section. And, specifically,
3 just read the first paragraph and little "A" in
4 Section 2.

5 And when you're done with that, scroll
6 down to Section 11, little x, little i, and read
7 that paragraph.

8 A. Which one?

9 Q. Little x, little i. It's the last part
10 of Section A.

11 A. Okay.

12 Q. Part of the section that I had you read
13 says that "Each agency shall also establish a
14 goal for awards made to 8(a) firms pursuant to
15 Section 8(a) of the Small Business Act." Now,
16 does that refresh your recollection as to whether
17 or not there were any Executive Orders requiring
18 agencies --

19 A. Well, that's not what you asked me. You
20 didn't ask me if there ever were. You asked me
21 if we currently do that, and we currently do not
22 do that. In 2000 we did.

23 Q. And we stopped -- I'm sorry. You
24 stopped?

25 A. Yes.

1 Q. Why?

2 A. I don't know. I'm assuming this
3 Executive Order is no longer in place, because
4 it's not -- the government doesn't require it any
5 longer.

6 Is this Executive Order still in place?
7 Many Executive Orders are repealed. Is this one
8 repealed?

9 Q. I haven't seen it repealed. Have you?

10 A. I'm asking you. You're the one that
11 brought it up to me. I don't know.

12 Q. But I'm not the witness, so I can't
13 answer your questions.

14 A. Okay.

15 Q. You're not aware of it being repealed;
16 is that right?

17 A. I am aware that we used to do this and
18 we've stopped doing it. We would only do so if
19 we were told to do so. We wouldn't do it on our
20 own.

21 Q. Okay. Do you know who told you to do
22 so?

23 A. I do not.

24 Q. Okay. Is there any penalty for
25 exceeding a goal for Small or Disadvantaged

1 Businesses?

2 A. A penalty to whom?

3 Q. To the agency that exceeds the goal.

4 A. No, there's no penalty for exceeding a
5 goal.

6 Q. Okay. Is there an adjustment to future
7 goals if an agency exceeds the goal?

8 A. The future goals are set based upon what
9 we believe the agency can actually do. So if
10 they've reached a higher goal, then maybe that
11 would be taken into account for future goals,
12 unless the agency can talk to us and say why that
13 was an anomaly and they really can't do that in
14 the future. And then we would go back and forth
15 with them with a discussion to see what they can
16 and can't do for the future.

17 Q. Okay. How does a company become an SDB?

18 A. There's no certification process for
19 SDBs. A firm can self-certify to that generally.
20 If you're an 8(a) firm, obviously you have been
21 certified as an 8(a) firm, and that automatically
22 makes you an SDB, as well. But other firms, for
23 goaling purposes, can, in fact, self-certify
24 their status.

25 Q. Is there any kind of application to be

1 an SDB?

2 A. Not currently.

3 Q. And I take it -- describe the process by
4 which a firm can identify or self-certify as an
5 SDB.

6 A. The process? "I self-certify as an
7 SDB."

8 Q. Well, does it do that when it fills out
9 a registration form in SAM, for example?

10 A. It could do that in SAM, it could do
11 that as part of a con -- an offer for a contract.
12 But, yes, in SAM it can do that.

13 Q. Okay. But there's other ways it can do
14 it aside from registering as an SDB in SAM; is
15 that right?

16 A. SAM is the best way to do it, of course.
17 That's where agencies will look to verify.

18 Q. And when you say "verify," you mean
19 simply check to make sure that the firm has
20 self-certified as an SDB; is that right?

21 A. Yes. That's correct.

22 Q. Okay. And just to be clear, if a firm
23 owned by an Irish-American male wishes to certify
24 as an SDB, that firm is an SDB, right?

25 A. Unless someone protests that status.

1 the tribes, the ANCs, the Native Hawaiian
2 Organizations, the system isn't proper yet, so
3 some of these forms must be filled out on an ad
4 hoc basis for them, but not for the individually
5 owned firms. Again, this is the individual one.
6 This is different.

7 So in terms of the forms -- I'm
8 just talking generally, in terms of the forms
9 themselves, individually owned firms do not fill
10 out forms any longer.

11 Q. Okay. You're familiar with the
12 presumption of social disadvantage, right?

13 A. I am.

14 Q. Okay. Let's break out of this and go
15 back to our screen.

16 Those applying for the 8(a) BD program
17 who identify themselves as a member of a group
18 that is listed in the regulations as having a
19 presumption of social disadvantage, do they have
20 to make any narrative statement concerning their
21 social disadvantage?

22 A. They are not required to do so.

23 Q. Well, is there a place for them to do so
24 if they wanted to?

25 A. I can say that, you know, in the old

1 paper system, firms used to do it sometimes even
2 though they didn't have to. I think in the
3 certification process online, it's harder to do
4 that.

5 Q. Okay. So does someone claiming
6 Native American status on the online form have
7 to identify as either an Alaska Native, a Native
8 Hawaiian or a member of a Indian tribe?

9 A. Yes.

10 Q. Okay. And does the form make clear that
11 Alaskan Natives and Native Hawaiians are Native
12 Americans?

13 A. Well, I believe they do. Our
14 regulations certainly say that.

15 Q. Okay. So does the SBA keep any
16 information on what percentage of people who
17 self-identify as Native Americans are members of
18 tribes?

19 A. I'm not understanding. If you're
20 identifying as a Native American, you must be a
21 member of a federal or state-recognized tribe in
22 order for us to consider you to be such. So
23 every individual who was identified as an a
24 Native American would be a member of a tribe.

25 Q. Okay. That sounds like a no, but let me

1 So if one person owns a hundred percent
2 but is not involved in day-to-day management,
3 but someone else owns zero and is involved in
4 day-to-day management, that person would also
5 have to demonstrate that they are, in fact,
6 economically disadvantaged.

7 Q. Okay. Does the business opportunity
8 specialist have access to the general economic
9 position of those in the same or similar
10 businesses as the applicant?

11 A. We're looking at whether or not the
12 individual who's seeking certification meets the
13 economic disadvantaged criteria. That's all they
14 are looking at in that regard.

15 Q. Well, I guess I'm asking whether part of
16 that criteria is a comparison of the individual
17 to others in the same or similar line of
18 business?

19 A. In establishing those economic
20 disadvantaged criteria, that's where that
21 was considered. It's not considered for each
22 applicant. It's considered in establishing the
23 standards themselves.

24 Q. All right. I think that answers my
25 question, but let me make sure I understand it.

1 A. I would think that's an error we should
2 fix.

3 Q. Okay. Does the SBA have a database that
4 tells it the value of other firms that are not
5 owned by socially disadvantaged individuals?

6 A. A database that what?

7 Q. That tells the SBA the value of
8 ownership interest in other firms that are not
9 owned by socially disadvantaged individuals?

10 A. I don't believe that there is a database
11 of that.

12 Q. Okay. Does the -- the -- and a
13 determination of whether someone is economically
14 disadvantaged, whether an individual is
15 economically disadvantaged, is the same
16 regardless of what line of business that
17 person happens to be in, right?

18 A. The economic disadvantaged criteria is
19 across the board for all industries, that's
20 correct.

21 Q. Did the SBA ever have different criteria
22 for economic disadvantage for different lines of
23 business?

24 A. Not that I know of.

25 Q. So let's talk for just a moment about

1 changed regs when we thought that was
2 appropriate.

3 Q. Okay. Let me rephrase the question,
4 then.

5 Were there two different requests made
6 of the SBA at around that time, one to include
7 Indonesian Americans as a presumptive group, and
8 the second to include Indonesian Americans as a
9 subgroup of some other already-recognized
10 presumptive group?

11 A. I think that is the way we believed is
12 the way it should be, and that's the way we
13 processed it, --

14 Q. You processed the --

15 A. -- if that's what --

16 Q. I'm sorry. Go ahead.

17 A. I mean, honestly, I'm not even sure
18 it's appropriate to say that they applied as
19 a petition. You know, we've identified that as
20 such. But, in reality, it may have just have
21 been, hey, we think we should be in this group
22 here. And someone may have said, oh, let's call
23 that a petition. And we thought about it and
24 said, you're right, you should be in that group.
25 Is that really a petition or is that just SBA

1 rethinking its regulations? I don't know the
2 right answer to that question, but it was
3 probably more informal than formal.

4 Q. I see. Okay. But what we have been
5 calling a petition may have just been a request
6 to be included as a part of the Asian Indian
7 protected group; is that right?

8 A. Correct.

9 Q. So when a group makes an application,
10 who within the SBA makes the determination about
11 approving or disapproving?

12 A. So that was done by our associate
13 administrator of business development, or, at the
14 time, may have been called, as you mentioned him
15 before, the Associate Administrator for Minority
16 Small Business and Capital Ownership Development.

17 Q. Okay. So, basically, what Ms. Peebles'
18 position is today?

19 A. That's correct.

20 Q. Okay. And it's the case that there
21 hasn't been an application since September of
22 1999; is that right?

23 A. I have not seen one since then.

24 Q. Okay.

25 A. No, none since then.

1 Q. Has that ever happened?

2 A. Not to my knowledge.

3 Q. Okay. Let's talk about an individual's
4 claim of social disadvantage. Is there a form
5 for challenging someone's claim of social
6 disadvantage?

7 A. So, first of all, again, there's no
8 forms at all any longer in the application
9 process. Everything is done by -- through
10 the certification through the online answering
11 questions. But I'm not understanding your
12 premise. Who's questioning social disadvantage,
13 SBA or some third party? I'm not understanding
14 what you're trying to get at.

15 Q. Third party.

16 A. There's no process for a third party to
17 question someone's social disadvantage as part of
18 the application process.

19 Q. Okay.

20 A. Although SBA's regulations do, in
21 fact, talk about that, you know, anyone with
22 information that questions the eligibility of
23 participant, once you're in the program, to
24 continue, they can give SBA information and
25 the SBA will consider that information.

1 applicant?

2 A. I don't understand that question.

3 Q. Okay. Well, the regulation, as we
4 both said, says that "The presumption of social
5 disadvantage can be overcome with credible
6 evidence to the contrary," right? The one kind
7 of credible evidence to the contrary is that the
8 person who owns the applicant does not actually
9 identify with the presumptive group that that
10 person claims to be a part of. And I'm asking
11 whether there are any challenges -- there have
12 been any challenges to the presumption of social
13 disadvantage other than those kinds of
14 challenges?

15 A. As I mentioned earlier, the ones that
16 we have are the ones that you're talking about.
17 Failure to identify as that group. You are
18 Hispanic, but you didn't talk about it until two
19 weeks before this application process started.
20 You are a Native American, but just got your card
21 two weeks ago. Those are the types of questions
22 that we've run into through the years. We have
23 not run into someone questioning status based
24 solely on their identity of a group.

25 Q. So there's been no challenge to

1 someone's social disadvantage based, for example,
2 on the fact that, although they do identify as a
3 member of a presumptive group, they have not been
4 subjected to discrimination; is that right?

5 A. There has not been a challenge that I'm
6 aware of in that regard.

7 Q. Okay. How often is there a challenge
8 to someone's identification as a member of a
9 presumptive group?

10 A. That, also, is hit or miss. It will
11 happen sometimes, and sometimes it won't.
12 I don't have a number for you on that. It just
13 -- does it happen often? I don't think it's
14 often. I don't think it's most cases. I
15 think it's a minority of the cases, but it is a
16 significant number of cases.

17 Q. Well, could you give me a rough estimate
18 of what "a significant number" means?

19 A. It happens every year to a certain
20 number of cases. So it's not something that
21 happens once every five years. It's not
22 something that happens every case. It's not
23 something that happens every two cases. But it
24 happens every year a few times.

25 Q. And how many applications are there in a

1 Q. Okay. I used the wrong word. I
2 apologize.

3 So the first four years are the
4 developmental stage and the last five years are
5 considered the transitional stage; is that right?

6 A. Yes. Yes.

7 Q. Okay. And at the end of nine years,
8 a participant either completes the program or
9 graduates from the program, right?

10 A. Yes.

11 Q. Okay. And graduation requires that
12 the participant show that they have met their
13 objectives in their initial business plan, right?

14 A. Correct.

15 Q. Okay. And completion, presumably, means
16 that the nine years are over but the participant
17 has not shown that; is that right?

18 A. Yes.

19 MR. ROSMAN: Okay. So, Michelle, could
20 you put in the 408 form for fiscal year 2015? I
21 think it starts with FY 2015.

22 MS. SMITH: Before you get to this
23 exhibit and any questions regarding it, I think
24 we should break for lunch. It's 12:30. We can
25 break for an hour, or more, if people want to.

1 on Exhibit 6 or 7?

2 MR. ROSMAN: Six, right, Michelle?

3 THE WITNESS: Oh, I'm on 7. I thought
4 you said 7. I'm sorry.

5 MR. ROSMAN: I said 7 at first, and then
6 I corrected myself.

7 MS. SCOTT: Yeah. It should be 6, 7 and
8 8, Michael. Sorry.

9 MR. ROSMAN: Okay.

10 THE WITNESS: Okay. Page Number 12?

11 BY MR. ROSMAN:

12 Q. It says 12 at the bottom. There's a
13 Table 3 at the top. That's what I'm going to ask
14 you about.

15 A. Okay.

16 Q. So in Table 3, we have identity of
17 those who reached various actions in the program,
18 right?

19 A. Okay.

20 Q. Okay. And if I'm reading this
21 correctly, it indicates that in, for example,
22 fiscal year 2014, 870 participants completed the
23 program, but only two either graduated or early
24 graduated; is that right?

25 A. That's what it says.

1 Q. Okay. And just so we're going back to
2 the testimony that you said previously, that
3 would mean the vast majority of people who
4 finished the program in 2014 did not meet the
5 objectives of their business plan, right?

6 A. I don't necessarily think that's true.
7 I think people are -- when it says this, I'm
8 thinking it's early graduation, is my guess,
9 only because when firms are leaving the program,
10 sometimes they do an analysis of the business
11 plan and sometimes they do not. So I don't think
12 it's fair to say that 868 firms did not meet
13 their plan. I don't think that's fair. I think
14 that two firms probably graduated early and SBA
15 didn't necessarily do a full analysis of every
16 other firm coming through or not coming through.

17 Q. Well, how would you know that to be
18 true?

19 A. Based upon this table, you probably
20 would not know that.

21 Q. Okay. And the term "graduated"
22 indicates that it includes both those firms that
23 left the program early and those programs that
24 left the program after nine years, right?

25 A. In theory, yes.

1 for me, please?

2 A. A follow-on contract is when the same
3 item is being re-procured again by the same end
4 user.

5 Q. And the presumption in the 8(a) BD
6 Program is that follow-on contracts should remain
7 in the 8(a) Program, right?

8 A. Generally speaking, yes.

9 Q. Okay. And that's true even if a
10 contractor that has been performing the
11 contract is leaving the 8(a) Program, right?

12 A. Well, when that is -- when that is
13 happening, and that contract is of significant
14 benefit to the firm's viability or business
15 development, that particular firm can ask that
16 SBA release the requirement from the program so
17 that it had the opportunity to compete on it
18 outside of the program.

19 Q. Okay. But let's say it's not that
20 important to the individual contractor, this
21 presumption --

22 A. Then, yes, it would normally stay in the
23 program.

24 Q. And how often is it the case that a
25 contractor in the 8(a) BD Program asks to have a

1 those two was just performing a smaller contract,
2 then it wouldn't be a new requirement
3 necessarily, right?

4 A. I think, again, we'd have to find out
5 exactly what the other ones were performing and
6 we would have to compare that to what this is.

7 Q. Okay. We'll move on.

8 So I may have asked this question
9 previously, and if I did I apologize, did the
10 SBA perform any adverse impact analysis on any
11 contract in which Ultima Services Corporation was
12 involved?

13 A. As you've seen through these letters,
14 the one seemed to indicate that they did. But
15 if they did, in fact, do that, I believe that was
16 incorrect. And all the other ones found it to be
17 not necessary to do.

18 MR. ROSMAN: Why don't we take 10
19 minutes?

20 (Recess taken -- 3:10 p.m.)

21 (Resume testimony -- 3:21 p.m.)

22 BY MR. ROSMAN:

23 Q. Does the SBA have a database of
24 nondisadvantaged individuals or nonparticipants
25 that they use when they determine whether or not

1 someone has less access to capital than someone
2 in the same or similar line of business.

3 A. I don't believe such a database exists.

4 Q. Okay. Do they have any other
5 information in some format, other than a
6 database, that they use to make those
7 comparisons?

8 A. I don't believe that's -- as I
9 said, we look at that information in establishing
10 the thresholds. We don't look at it on a
11 case-by-case basis any longer.

12 Q. What kind of information did it look at
13 in establishing the thresholds?

14 A. We looked at business owners in similar
15 industries -- and, you know, in small business
16 owners versus small disadvantaged business
17 owners, in general.

18 Q. Well, I understand that you're looking
19 at small business owners, but my question was
20 what kind of information?

21 A. We look at the same types of information
22 that they have, in terms of assets and income and
23 net worth and things of that sort.

24 Q. Okay. And where do you look for that
25 information for nondisadvantaged individuals.

1 A. Well, when those analysis are done, we
2 look for -- we find someone that knows how to
3 find that information for us. You know, I'm not
4 the person who goes to find that information. We
5 would ask for, can you find the information on
6 such and such, and then we have people go look
7 for that information and they find it. Where
8 they actually find it, I can't answer that
9 question.

10 Q. Well, did you ask anyone at SBA who goes
11 about doing that?

12 A. Did I ask them -- right now did I ask
13 them that? No, I didn't ask them that.

14 Q. In preparation for the deposition, did
15 you ask anyone at SBA which individuals go about
16 doing that?

17 A. Certainly not.

18 Q. Okay. So what evidence does the
19 SBA use to justify the presumption of social
20 disadvantage?

21 A. Section 2(f) of the Small Business Act.

22 Q. Anything else?

23 A. I think Congressional findings are
24 pretty important, --

25 Q. Okay.

1 A. -- and SBA follows Congress's intent for
2 us.

3 Q. Those Congressional findings were made
4 in what year?

5 A. I don't know the year, specifically.

6 Q. Has the SBA looked at any additional
7 evidence since those findings were made?

8 A. I'm not understanding the question.
9 Congress finds that certain groups have been
10 discriminated because of their identity as such
11 groups. That's what Congress has found. So are
12 you asking if we questioned Congress? Is that
13 what you're asking me, because I'm confused by
14 that statement.

15 You know, first of all, as you
16 know, Congress found that it's important that
17 disadvantaged individuals are part of the economy
18 in order to have a functioning economy, and that
19 many people are disadvantaged because of their
20 identification as members of certain groups.
21 Congress has made these findings. And then
22 Congress also found that these groups include,
23 and they set forth certain groups. So are you
24 asking should SBA ignore Congress's findings?
25 I don't think that's the appropriate response of

1 what SBA should do. We should follow Congress's
2 findings in that regard.

3 MR. ROSMAN: Could you read back the
4 question, please?

5 (Referred-to testimony read back.)

6 BY MR. ROSMAN:

7 Q. Can you answer that question, please?

8 A. I believe I answered that question. SBA
9 relied on those findings.

10 Q. The question was has the SBA looked at
11 any evidence since those findings were made?

12 A. And I answered that SBA has relied on
13 those findings. That's what we relied on.

14 Q. That's not an answer.

15 A. It's my answer.

16 Q. The question is did you look at any
17 evidence subsequent to those findings being made?

18 A. SBA relied on those findings. That's my
19 answer.

20 Q. Okay. I don't consider that a
21 responsive answer, --

22 A. Okay.

23 Q. -- and we'll take appropriate steps.

24 Does anyone in the SBA review disparity
25 studies?

1 A. For fun? No, not for fun.

2 Q. No. As part of their job.

3 A. I don't believe that's part of their
4 job.

5 Q. Has the SBA examined whether the goals
6 of the 8(a) BD program could be achieved with
7 race-neutral alternatives?

8 A. No.

9 Q. Has it considered what the program would
10 look like if it eliminated --

11 A. Can I add on to my answer before you go
12 on?

13 Q. I'm sorry. I thought you were done.
14 You sort of paused.

15 A. I did pause, but I rethought. Unless
16 you'd rather go on. I don't care. Either way.

17 Q. No. No. Please go ahead. Finish.

18 A. So, I'm sorry. Could you tell me the
19 last question again, because I had something in
20 my head, and I forget what it was. Can you tell
21 me last question again?

22 MR. FISHMAN: Whether race-neutral
23 aspects have been used previously.

24 MS. SMITH: Well, let's wait for the
25 question to be read back before responding.

1 Thank you.

2 THE WITNESS: Yeah.

3 MR. ROSMAN: Why don't we have both the
4 question and the answer read back because he may
5 have forgotten --

6 THE WITNESS: Well, so far my answer
7 was no only, and I wanted to add onto it. So the
8 question is all I need.

9 MR. ROSMAN: Oh, okay. Go ahead, then.

10 (Referred-to testimony read back.)

11 THE WITNESS: Okay. So my answer was
12 no, and that is the right answer, except that my
13 further thoughts were is that we believe that the
14 program is not race-conscious, generally. Yes,
15 there is a social disadvantaged portion of it,
16 but there are many people who are not members of
17 those groups who are in the program, and anyone
18 can, in fact, prove his or her disadvantage and
19 be admitted to the program. So the program, as a
20 whole, is not race-conscious even though there is
21 a portion of it that has a race aspect of it.

22 BY MR. ROSMAN:

23 Q. Has there been any study by the SBA
24 about how the program would function if the
25 presumption in Section 124.103(b)(1) were

1 eliminated?

2 A. Has there been a study? No, there's
3 been no study to that effect.

4 Q. Has there been analysis of any kind
5 regardless of whether you want to characterize it
6 as a study?

7 A. I don't believe so.

8 Q. So how would the SBA know whether the
9 goals of the program could be achieved in the
10 absence of the presumption?

11 A. I don't -- I don't know why SBA would
12 -- would con -- consider changing something that
13 Congress told us to do. So we are implementing
14 the statute as Congress presented it to us. We
15 are not the ones who are considering changing it.
16 That's up to Congress to do so.

17 Q. By the way, Congress didn't actually say
18 to employ a presumption of social disadvantage,
19 did it?

20 A. Congress said that certain members
21 -- members of certain identified groups are
22 presumed to be disadvantaged for purposes of
23 the 8(a) Program. They did say that, yes.

24 Q. Okay. Let's talk about some of the
25 other parts of the 8(a) Program.

1 hear you.

2 Okay. Why don't we take five minutes.

3 I'm close to done, I think.

4 MS. SMITH: Okay.

5 (Recess taken -- 3:46 p.m.)

6 (Resume testimony -- 3:52 p.m.)

7 BY MR. ROSMAN:

8 Q. Has there been any change in the overall
9 governmental goal for SDBs in the last several
10 years?

11 A. Well, this year the President just
12 increased the SDB goal to 11 percent.

13 Q. Okay. When exactly was that, if you
14 know?

15 A. February/March. I don't remember
16 exactly.

17 Q. February or March of 2022?

18 A. Yes.

19 Q. And that was from 5 percent?

20 A. So, again, remember up front I said
21 it's a minimum of 5 percent, and it directs the
22 President to make those determinations. So even
23 though it's a minimum of 5 percent, the President
24 has decided that 11 percent is the appropriate
25 number right now considering that last year

1 government-wide we reached 10 percent.

2 Q. Okay. And is it no less than 11
3 percent, as it was for 5 percent, or is it just
4 11 percent?

5 A. I think it's 11 percent this year.

6 MR. ROSMAN: Okay. Thank you.

7 Well, obviously, for reasons we
8 discussed earlier, I don't believe the witness
9 was adequately prepared on certain of the topics
10 that he was designated to testify on and that
11 he did not answer all of the questions fully.
12 Subject to those caveats, I have nothing further
13 at this time.

14 MS. SMITH: Okay. I have a few
15 questions.

16 EXAMINATION

17 BY MS. SMITH:

18 Q. Since 2015, has SBA had a goal
19 specifically for the 8(a) Program?

20 A. No.

21 Q. Of the applications from individuals who
22 qualify for the presumption in 13 CFR Section
23 124.103(b)(1), what percentage of those
24 applications are approved?

25 A. Of people who are presumed, --

JOHN KLEIN

C E R T I F I C A T E

I do hereby certify that I am a Notary Public in good standing, that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 10th day of May, 2022.



Notary Public

ERRATA

1

2 PAGE LINE CHANGE

3 P. 11; Line 24; insert the word "the" between the words "to" and "8(a)" -----

4 Reason for

5 Change: Typo

6 PAGE LINE CHANGE

7 P. 13; Line 12 and Line 13; change the word "cell" to "sub" -----

8 Reason for

9 Change: Typo

10 PAGE LINE CHANGE

11 P. 17; Lines 2-3: insert the word "and" between the words "Management" and "Technical" -----

12 Reason for

13 Change: Typo

14 PAGE LINE CHANGE

15 P. 21; Lines 17-18; change "of participants in a program, dollars," to "participants in the 8(a) program, contract dollars," -----

16 Reason for

17 Change: Typo; clarity

18 PAGE LINE CHANGE

19 P. 40; Lines 8-9; First sentence should read: "I'm sure there are several agencies whose goals for SDBs are greater than 5 percent." -----

20 Reason for

21 Change: Typos

22 PAGE LINE CHANGE

23 P. 54; Line 14; Change "certified.gov" to "certify.gov" -----

24 Reason for

25 Change: Typo

Veritext Legal Solutions

1 PAGE LINE CHANGE

2 _ P. 59; Lines 9-10; change "but on the science part, many times it's" to "but if something is incorrect, many times it's" -----

3 Reason for

4 Change: Transcription error

5 PAGE LINE CHANGE

6 _ P. 59; Lines 17-20; sentence should read as follows: "And they do it based upon a certain size standard. Each NAICS code is assigned a corresponding size standard. So I can register as a small business for NAICS Code 123456, and as an other than small business for NAICS Code 123457, depending upon the corresponding size standard corresponding to the NAICS Code." -----

7 Reason for

8 Change: Typos and Clarification

9 PAGE LINE CHANGE

10 _ P. 60; Line 10; change the word "primary" to "apparent" -----

11 Reason for

12 Change: Typo

13 PAGE LINE CHANGE

14 _ P. 74; Lines 3-4; should read "or they look for things as to whether there are any outstanding debts or things of that sort." -----

15 Reason for

16 Change: Transcription error

17 PAGE LINE CHANGE

18 _ P. 83; Line 7; should read "Alaska", not "Alaskan" -----

19 Reason for

20 Change: Typo

21 PAGE LINE CHANGE

22 _ P. 83; Line 9; delete "or it's -" and add the word "be" between the words "deemed to" and "owned and" -----

23 Reason for

24 Change: Typo

1 PAGE LINE CHANGE

2 P. 87; Line 4; change "the ANC owns X and Joe Smith owns 400 percent of one company" to "the
3 ANC owns 51% of X and Joe Smith owns 49 percent of that company" -----

3 Reason for

4 Change: Typo

5 PAGE LINE CHANGE

6 P. 107; Line 22; change "company Y" to "country Y" -----

7 Reason for

8 Change: Typo

9 PAGE LINE CHANGE

10 P. 127; Line 13; change the word "graduate" to "graduation" -----

11 Reason for

12 Change: Typo

13 PAGE LINE CHANGE

14 P. 138; Line 24; Change "SDBO" to "SDVO"; change "SWB" to "WOSB" -----

15 Reason for

16 Change: Typos

17 PAGE LINE CHANGE

18 P. 140; Line 12; change "JCBD" to "GCBD" -----

19 Reason for

20 Change: Typo

21 PAGE LINE CHANGE

22 P. 140; Line 23; Change "4" to "4.5 million" -----

23 Reason for

24 Change: Typo/clarification

1 PAGE LINE CHANGE

2 P. 153; Line 18; change "an it" to "it an" -----

3 Reason for

4 Change: Typo

5 PAGE LINE CHANGE

6 P. 194; Lines 18-19; "7(j) is management technical assistance" should be changed to read "7(j) is a management and technical assistance program" -----

7 Reason for

8 Change: Typo

9 PAGE LINE CHANGE

10 P. 195; Line 15; Change "with grants" to "or grants" -----

11 Reason for

12 Change: Typo

13 PAGE LINE CHANGE

14 P. 195; Lines 22-23; Change "these contractor grantees" to "these contractors or grantees" ---

15 Reason for

16 Change: Typo

17 PAGE LINE CHANGE

18 P. 199; Line 18; Change "as SBA's" to "of SBA's" -----

19 Reason for

20 Change: Typo

21 PAGE LINE CHANGE

22 -----

23 Reason for


24 Change:

ACKNOWLEDGMENT OF DEPONENT

I, John W. Klein, do
 hereby certify that I have read the foregoing
 pages 1 to 212 and that the same is a
 correct transcription of the answers given by
 me to the questions therein propounded,
 except for the corrections or changes in form
 or substance, if any, noted in the attached
 Errata Sheet.

6-10-22

DATE


 SIGNATURE

Subscribed and sworn to before
 me this _____ day of _____, 2022.

My commission expires:

Notary Public